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No. 74-452

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

TWENTIETH CENTURY MUSIC CORPORATION and MARY M. BOURNE, *Petitioners*,

v.

GEORGE AIKEN, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT GEORGE AIKEN

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BRIEF FOR RESPONDENT GEORGE AIKEN

QUESTION PRESENTED

Whether the owner of a "fast food" shop who connected several speakers to his radio so that broadcasts received on the set were audible to his employees and customers thereby engaged in an infringing "performance for profit" of copyrighted music which was broadcast by a radio station under a license from the copyright owners?

RESTATEMENT OF THE CASE

Since petitioners' "Statement of the Case" does not contain several pertinent facts, a concise restatement is deemed necessary.

George Aiken owns and operates "George Aiken's Chicken," a fast-service food shop in Pittsburgh, Pennsylvania. Approximately 60% of his customers buy food to "take out"; 40% consume the food on the premises. Since there are no waitresses, the latter customers, after buying the food, carry it on disposable paper to a counter or booth where they consume it. The sit-down area is capable of accommodating up to approximately 40 customers. Normally, a "take out" customer spends no more than two to five minutes in the store; in those instances in which the customer eats the food in the store, the total time is between 10 and 15 minutes. (App. 58A.)

Aiken had a radio in the store for a number of years, primarily for the enjoyment of the employees. At first he kept the radio set, without any external speakers, behind the counter. He found, however, that located in that position, it interfered with his employees' conversation with customers. He, therefore, installed two speakers in the ceiling[1] so that the sound would be substantially uniform throughout the public portion of the premises. As Aiken testified, this was done "primarily to take the near effect of the radio blaring in

[1] Petitioners appear to be in error in their reference to *three* of the five speakers as being located in the public portion (Br. 7). Since the district court found a total of five speakers, and it is undisputed that one of these was in the kitchen, one in the office and one in the washroom, Aiken's testimony (App. 59A) that only two speakers were located in the public portion was obviously accepted by the trial judge. (356 F. Supp. 271, 272 (1973)).

the employees' ears away" (App. 57A-58A). Another speaker was placed in the kitchen, one in the washroom and one in the office (App. 59A). Aiken's practice was to turn on the radio set in his store when the shop was opened at 9:00 a.m. and to keep it tuned to a local broadcast station until the close of business at 6:00 p.m. The radio was on whether or not customers were in the store.[2] No effort was made to alter, delete or add to any part of the broadcasts; news, musical programs, commercial announcements and all other material broadcast by the station were heard in the store exactly as broadcast (App. 58A).

Aiken acknowledged that the availability of the broadcasts contributed to his employees' happiness and that, as a consequence, they worked more efficiently (App. 59A). Customers, while they stood in line waiting to make their purchases as well as while they were eating the food, heard the broadcasts as they came through the speakers (App. 60A). In response to an inquiry whether he was "using the speakers for a profit," Aiken stated: "[I] am not selling music, they are not dancing to it, they are not enjoying themselves through it. The customers aren't there long enough to hear more than one or two songs." *Ibid.*

On March 11, 1972, Aiken's radio was tuned to Station WKJF-FM, Pittsburgh, which, on that day, broadcast, as part of its programming, two musical compositions, "The More I See You" and "Me and My Shadow". The copyright owners of the two compositions, petitioners Twentieth Century Music Corporation and Mary M. Bourne, respectively, were members of the American Society of Composers, Authors and Pub-

[2] There were no customers during approximately 40% of the time the store was open for business (App. 57A).

lishers ("ASCAP")[3] which they authorized to grant licenses to broadcast stations for performance of their works.

An ASCAP representative who was engaged to observe Aiken's operations was in the store on March 11, 1972 when the two musical compositions were broadcast by Station WKJF-FM. He testified that during the approximately one hour and twenty minutes that he spent in Aiken's store, there were a number of customers, including some who sat down and ate the food which they purchased; he estimated that a minimum of six and a maximum of eight customers, in addition to three employees, were present at any one time (App. 20A-21A).

Station WKJF-FM having entered into ASCAP's "local station blanket radio license" broadcast the two musical works as authorized by the copyright owners (App. 20A). The station was obligated under the license to pay ASCAP a commercial fee equivalent to 2% of its "net receipts from sponsors after deduction" (App. 72A). It was also required to pay a sustaining fee based either on a formula involving the station's advertising rate or a flat sum if its net receipts

[3] ASCAP is an unincorporated association of composers, authors, and publishers of musical compositions and operates a copyright pool which licenses performances of the copyrighted music contained in its repertory. As the result of an antitrust suit brought against ASCAP by the Government many years ago, it is subject to the provisions of the Final Judgment in *United States* v. *American Society of Composers, Authors and Publishers,* 1950 Trade Cases, ¶ 62,595 (S.D.N.Y. 1950). *See also K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1 (9th Cir. 1967). The United States District Court for the Southern District of New York retains jurisdiction over the Final Judgment to supervise arrangements for licenses of the ASCAP repertory.

from sponsors was less than a stated amount.[4] The license included the provision inserted in all ASCAP radio licenses that: "Nothing herein contained shall be contrued as authorizing LICENSEE to grant to others any right to reproduce or perform publicly for profit by any means, method or process whatsoever, any of the musical compositions licensed hereunder or as authorizing any receiver of any radio broadcast to perform publicly or reproduce the same for profit, by any means, method or process whatsoever." (App. 28A.)

ASCAP has about 5,150 outstanding licenses with commercial establishments which use radio broadcasts. These licensees are permitted under their licenses to use ASCAP music by means of tapes and records as well as from radio broadcasts. (App. 43A.)[5] The fees derived by ASCAP from these licenses is $246,000 annually (App. 30A). ASCAP's General Counsel testified that ASCAP did not seek to require licenses from commercial establishments which use radio broadcasts of ASCAP music on an ordinary home receiving set without external speakers (App. 38A, 44A).

On June 2, 1972, a suit was brought against Aiken by the copyright owners of "The More I See You" and "Me and My Shadow" in which they alleged that on March 11, 1972 Aiken had publicly performed their compositions for profit in his fast-food shop and had,

[4] Since WKJF-FM's "net receipts from sponsors" was estimated to be $129,000 for the first year, it was obligated to pay a sustaining fee of "21.6 times the highest one-minute card rate of the station for a single minute," subject to adjustments in succeeding years for changes in the amount of net receipts from sponsors (App. 72A).

[5] The record does not indicate whether or not if these establishments also used live entertainment they would be covered for ASCAP compositions by the same ASCAP license.

thereby, infringed their copyrights. The district court concluded that *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931), was controlling and that Aiken, therefore, was an infringer. Accordingly, a judgment in the sum of $250.00 was entered for each plaintiff. (356 F. Supp. 271 (W.D. Pa. 1973)).

This judgment was reversed by the U.S. Court of Appeals for the Third Circuit which held that in light of the views of this Court expressed in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974) concerning the appropriate standard to be applied in determining whether there is a "performance" for copyright purposes, Aiken's actions in merely extending the range of audibility of the broadcast program could not be deemed to have infringed copyrights. (500 F. 2d 127 (1974)). The case is before this Court on certiorari.

SUMMARY OF ARGUMENT

I.

The Court of Appeals, applying this Court's construction of the term "performance" as used in the Copyright Act, correctly decided that Aiken was not engaged in an infringing "performance" of the copyrighted musical compositions. To have held that Aiken was engaged in a performance of the musical compositions which were received from the broadcasting station would have run counter to the decisions establishing that operators of cable television systems and their subscribers (which include commercial establishments) are on the audience side of the line rather than on the performing side occupied by broadcasting stations.

In view of the "function" standard for performance prescribed in the *Fortnightly* and *Teleprompter* decisions of this Court, Aiken cannot be deemed to be an infringer of the copyrights in programs aired by the broadcasting station. His business was the selling of food to customers; his functions were completely unrelated to programming. He received the broadcast material (including music, news and commercials) simultaneously and without deletion exactly as they were sent over the air by the station. The copyright owners of the musical compositions which were broadcast had authorized the station to broadcast them. Their royalties—based on the revenues which the station derived from advertisers—were dependent on the total audience (whether at home, in stores, in vehicles or at offices) which the station could reach.

II.

Exacting a copyright license from Aiken would defeat the objectives of both the Copyright Act and the Communications Act. The broadcasts in this case were heard by members of the public, all of whom were within the normal reach of the broadcasting station. Imposing a license requirement on the ground that Aiken has engaged in a "performance for profit" may cause lunch counters, hairdressers, dentists' offices and a myriad of similar business and professional establishments throughout the country to keep their sets turned off, thereby depriving members of the public of access to radio broadcasts for a large segment of the day. Such a result would be inconsistent with the aim of the Communications Act to secure the widest possible benefit of radio to all potential listeners.

III.

Petitioners' assertion that *Jewell-LaSalle* is controlling is without merit. This Court has squarely rejected as unsound the test of "performance" used in that case and, while not explicitly overruling the decision, has limited it to its own facts. Those facts are readily distinguishable from the facts in the instant case, the principal distinction being that the copyright owners involved in *Jewell-LaSalle,* unlike petitioners, had not authorized the broadcast of their music.

IV.

Petitioners have fallaciously contended that congressional failure to enact various kinds of proposed legislation can be construed as a manifestation of an intent by Congress that the teaching of *Jewell-LaSalle* should be applied to the case at bar. No such intention can logically be inferred from congressional silence. In any event, whatever may be the nature and effect of future legislation in the copyright field, Aiken cannot be deemed an infringer under the statute now in effect.

V.

Petitioners' contention that the viability of *Jewell-LaSalle* should not be impaired because copyright owners derive compensation from extensive business relationships that have developed in reliance on that decision is also without merit. Not only is the income derived from these relationships relatively insubstantial, but petitioners have failed to demonstrate that their revenue will be diminished appreciably, if at all, by an affirmance of the decision below. Finally, their contention that *Flood* v. *Kuhn* is a precedent for

adherence by this Court to the erroneous standard of *Jewell-LaSalle* is untenable; the situation presented in *Flood* v. *Kuhn* was unique and clearly distinguishable.

ARGUMENT

I. Aiken Merely Aided in the Reception of Programs Broadcast by a Radio Station Which Was Licensed by the Copyright Owners to Perform These Programs; Therefore, He Did Not Engage in a "Performance for Profit" of the Copyrighted Material.

In *Fortnightly Corp.* v. *United Artists Television, Inc.,* 392 U.S. 390 (1968), this Court, upholding the rights of Community Antenna Television (CATV) systems to receive and rechannel television programs to their subscribers without incurring copyright liability to the program suppliers, stated that:

> "Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary."[8]

The activities of the CATV operator were held to fall on the viewer's side of the line.

In *Teleprompter Corp.* v. *Columbia Broadcasting Systems, Inc.,* 415 U.S. 394 (1974), in which the same standard was applied, the Court re-emphasized the language of *Fortnightly* that:

> "The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing,

[8] 392 U.S. at 398-99 (footnotes omitted).

> whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry."[7]

The copyright significance of the function involved in CATV operations did not turn on whether the subscriber received the broadcasts in his home or in his place of business. Among the subscribers to CATV services are many business establishments.[8] It is logically inconsistent for petitioners to claim that Aiken's store is on the performing side when this Court has held that CATV systems and their subscribers are on the audience side. In aiding his employees and customers to hear the broadcasts more comfortably, Aiken was functioning conceptually even closer to the audience than the CATV systems in *Fortnightly* and *Teleprompter*. The decision below correctly found no determinative differences on the question of "performance" between the CATV cases and the case at bar.[9]

Aiken's business is to sell food which customers could either "take out" or consume on the premises. As he described it, this was "primarily a delicatessen operation" (App. 57A). He was not in the business of

[7] 392 U.S. at 400-401, as quoted in *Teleprompter*, 415 U.S. at 403.

[8] The Court in *Fortnightly*, referring to the rates charged by CATV systems, noted that: "Increased charges were levied . . . for commercial establishments." 392 U.S. at 393, n.7.

[9] No distinction can be made in this context between television and radio programs; many CATV operators supply radio and television signals, *cf.* Radio Signals, Importation by Cable Television, 36 F.C.C. 2d 630 (1972).

selling entertainment.[10] Other than turning on his radio set to receive in its entirety, without editing, whatever was broadcast, Aiken had nothing to do with the performance.

ASCAP acknowledged that it would not have treated Aiken as an infringer if he had continued using an ordinary radio receiving set behind his counter. But using his radio in this way created a "blaring" effect which interfered with the employees' conversations with customers and he, therefore, sought to improve the reception by installing several speakers in the ceiling. This enabled the broadcasts to be heard uniformly throughout the premises. ASCAP's charge that he became an infringing performer by installing speakers in the ceiling is, we submit, bottomed on the unsound and rejected mechanistic standard of *Jewell-LaSalle*.

Construing the term "performance" in the Copyright Act in its "ordinary sense" and in line with "common understanding",[11] it would put an unbearable strain on realism to treat Aiken as having engaged in an infringing "performance." At no time did he attempt to delete, add to, or in any way alter the broadcasts as they came over the air. There is no evidence even of any equipment on his premises by which Aiken could have made any deletions or alterations of commercial announcements or other matter that

[10] Even though operators of CATV systems receive their income for rechanneling copyrighted material to subscribers, they are not in a performing role from a copyright standpoint. *A fortiori*, Aiken, whose income is realized solely from sales of food, cannot be deemed to have assumed the role of a performer of copyrighted material.

[11] *Cf.* White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1 (1908).

was broadcast. In short, the music, news, other programming, and commercial announcements broadcast by Station WKJF-FM were audible in Aiken's store exactly as they were sent over the air by that station for the purpose of being available to all members of the public within reach of its signal. The selection of the programming and of the commercial announcements was solely and entirely within the station's control; Aiken had nothing to do with the selection process except to turn the dial to the frequency on which the particular station was broadcasting; if the broadcast did not suit him, he had the choice of either turning the dial to another station or turning the radio off entirely.

Aiken and others in his store heard whatever came over the air simultaneously with its broadcast by the station; there was no attempt to tape or record the broadcasts for listening at a different time. Nothing which Aiken did extended the broadcasts of Station WKJF-FM to any audience beyond the normal reach of the station.[12] The employees and customers in Aiken's store were among those who were intended to be reached by the station. Commonly, broadcasters, in attempting to sell advertising to be carried on their stations, stress that their commercial messages are audible wherever the listener happens to be—whether at home, in a car, in a store, or at an office. The copyright

[12] Although Mr. Justice Fortas dissented in *Fortnightly* because the teaching of *Jewell-LaSalle* as to the meaning of the term "perform" in the Copyright Act was being abandoned, even he apparently interpreted *Jewell-LaSalle* as being applicable only to a situation involving "the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy. . . ." 392 U.S. at 406.

holders are the beneficiaries of these attempts to maximize the audience since their royalties—based, as they are, on the revenues of the station—reflect the number of listeners who are attracted to the station and who can, therefore, be claimed as part of the audience for advertising messages. As we demonstrate hereinafter under Point III, exacting direct license fees from small businesses such as Aiken's on top of the royalties paid by the broadcasting stations is unfair and unnecessary, as well as inconsistent with the objectives of both the Copyright Act and the Communications Act.

The Court of Appeals assumed that if Aiken was found to have engaged in a "performance", the other requisites for infringement, namely, that the performance be a "public" one, and "for profit",[13] were satisfied.[14] This Court, of course, is not precluded from affirming the decision on the additional ground that the "for profit" element was lacking.[15] It is doubtful that any part of the sale price of Aiken's delicatessen can reasonably by treated as compensation for the opportunity afforded the customer to listen to a radio while standing in line to make his purchase, or during the relatively short time spent in consuming the food. Further, Aiken's purpose is sufficiently different from that of the hotel owner in *Herbert* v. *Shanley Co.*, 242 U.S. 591 (1917), who supplied an orchestra and singers for

[13] 17 U.S.C. § 1(e) (1970).

[14] The Court of Appeals stated that "[n]either the plaintiffs nor the defendant argue with any conviction that the 'tuning in' of the radio by the defendant . . . constituted a private as distinct from a public 'performance'. Nor do they contend seriously that if such be the case that the 'performance' was not for profit." 500 F.2d at 130, n.7.

[15] *See* Helvering v. Gowran, 302 U.S. 238, 245 (1937).

the entertainment of persons who dined in the hotel restaurant as to warrant different treatment on this point.

While arguably everything that Aiken made available to his customers—including the paper on which the food was carried to the table, the various appurtenances in the store, as well as the opportunity to hear the radio broadcasts—were part of the "package" for which Aiken was paid, we think it more reasonable to consider them as such incidental parts of the transaction that they should not be held to be part of the consideration for the payments made by the customers. There was no evidence that any customers were induced even in the slightest degree to trade at Aiken's because of the music. And while the broadcasts were admittedly pleasant for his three employees to hear as they worked behind the counter or in the kitchen and, thus, hopefully enhanced their efficiency, this is a far cry from a system of providing radio and phonographic music for workers of the kind which was instituted by the factory owner involved in *Ernest Turner Electrical Instruments, Ltd.* v. *Performing Right Society,* 168 L. T. R. 285 (Ct. of App. 1943), cited by petitioners (Br. 20). Accordingly, it is submitted that the decision below can be affirmed on the ground that Aiken's activities in respect of the musical compositions were not "for profit" within the meaning of the Copyright Act.

Petitioners mistakenly rely (Br. 19-20) upon foreign precedents as support for their assertion that Aiken's conduct constituted a "performance". An examination of the cases cited by petitioners discloses that the foreign courts reached their conclusions upon

analyses of factual settings in terms of the "quantitative" standard articulated in *Jewell-LaSalle,* not in terms of the *function* served by the alleged infringer. Thus, whatever persuasiveness the cited foreign cases might have had prior to the *Fortnightly* decision has ceased to exist.[16]

II. Jewell-LaSalle Does Not Control the Present Case.

A. THE TEST OF AN INFRINGING "PERFORMANCE" APPLIED IN JEWELL-LaSALLE IS NO LONGER SOUND.

Petitioners' contention (Br. 13-18) that *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191 (1931), is controlling and that, consequently, Aiken must be deemed an infringer is untenable on several grounds.

In *Fortnightly,* the first case decided by this Court after *Jewell-LaSalle* in which the opportunity was presented to re-evaluate the standard of "performance" articulated in that decision, it was rejected. The Court quoted with approval [17] the statement from *Buck* v. *Debaum,* 40 F.2d 734, 735 (S.D. Cal. 1929),[18] that:

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[16] Petitioners' further effort (Br. 33) to rationalize, by reference to the British copyright scheme, their attempt to achieve disparate treatment as between CATV operations and radio reception of copyrighted music is unpersuasive. While cable television operators are not defined as performers under the British Copyright Act of 1956, § 48(5), they are, nonetheless, subject to copyright liability as transmitters of broadcast programs, §§ 5(c) and 48(3). The express copyright liability to which British CATV operators are subject distinguishes the British scheme from American copyright law and negates petitioners' inference of approbation for different treatment of radio reception of copyrighted music from that accorded CATV operations.

[17] 392 U.S. at 398, n.24.

[18] The *Debaum* court held in favor of a cafe owner who was charged with having "performed" an ASCAP musical composition by tuning a radio to a broadcast from a licensed radio station for the benefit of his patrons.

> "One who manually or by human agency merely actuates electrical instrumentalities, whereby inaudible elements that are omnipresent in the air are made audible to persons who are within hearing, does not 'perform' within the meaning of the Copyright Law."

Fortnightly decided that the appropriate test requires an evaluation to determine whether the acts of the alleged infringer aid in the broadcasting of the copyrighted work or aid in the viewing (or listening) of the performance.

In enunciating this more realistic "function" test, the Court left no doubt that *Jewell-LaSalle* is no longer controlling on this point. As it subsequently stated in *Teleprompter*:[19]

> "In the *Fortnightly* case the Court of Appeals had concluded that a determination of whether an electronic function constituted a copyright 'performance' should depend on 'how much did the [CATV system] do to bring about the viewing and hearing of a copyrighted work.' 377 F.2d 872, 877. This quantitative approach was squarely rejected by this Court:
>
> > '[M]ere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. . . . Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.' 392 U.S., at 397."

The Court has thus explicitly discarded the rationale of *Jewell-LaSalle*. It refused to extend what it termed

[19] 415 U.S. at 407-08.

"a questionable 35-year-old decision" which it said "must be understood as limited to its own facts." 392 U.S. at 397, n. 18 and 401, n. 30.[20] In insisting, notwithstanding this recent history, that *Jewell-LaSalle* should control the disposition of the present case, petitioners are attempting to circumvent the logic of *Fortnightly* and *Teleprompter*, and urge that the latter cases, instead of *Jewell-LaSalle*, be limited to their own facts. Apart from exceptions for CATV systems, petitioners maintain that *Jewell-LaSalle* remains effective and requires that Aiken's use of speakers be defined as a "performance." This effort to limit *Fortnightly* and *Teleprompter* cannot be justified.

In *Teleprompter*, the "function" standard was reaffirmed despite arguments by copyright owners that the CATV systems[21] provided services far in excess of *Fortnightly*. Teleprompter interconnected with other CATV systems and by means of microwave imported distant signals that otherwise would not be available in the community. It also originated its own programming and sold commercial time. Notwithstanding these factual differences from the *Fortnightly* situation, the Court determined that in the interception of broadcast signals which were rechanneled to viewers, CATV systems were still functioning on the audience side of the line, not the side of the broadcasters, and thus were *not* infringing the copyrights in the programs embodied in the broadcasts.

[20] The *Jewell-LaSalle* rationale is also analytically defective because, as pointed out by a noted copyright authority, it is based on a faulty analogy to the "playing of a phonograph record," with respect to which there is a separate copyright provision. M. NIMMER, ON COPYRIGHT § 107.41 (1974).

[21] In *Teleprompter*, as in *Fortnightly*, the CATV systems provided service to hotels, motels, restaurants, bars, and other business establishments, as well as to private homes.

B. JEWELL-LaSALLE IS FACTUALLY DISTINGUISHABLE

This Court has not said in so many words that *Jewell-LaSalle* is overruled but it could not have been clearer in declaring that the premise underlying the decision is fallacious. The Court of Appeals was of the opinion that the 1931 decision was no longer viable. 500 F 2d at 136, n. 21. But whether or not *Jewell-LaSalle* was technically overruled, it has been explicitly limited to its own factual setting. The facts to which it has been confined differ in a very significant respect from the facts presented in the instant case.

The principal distinction [22] lies in the fact that the 1931 case involved the rarity of a radio station broadcasting music without the benefit of a license by copyright owners,[23] whereas Station WKJF-FM was duly authorized by the copyright owners to broadcast the musical compositions which were picked up by Aiken

[22] Aiken's installation of five speakers in his establishment differs markedly from the LaSalle Hotel's use of a large and powerful master receiving set and connecting wires by which music was "piped" to speakers and headphones in 200 guest rooms, as well as the public areas in the hotel. Moreover, from an economic standpoint, the hotel owner's objectives in providing hundreds of guests not only with sleeping accommodations but also with what was presumably considered a significant source of entertainment and recreation differ in substantial measure from Aiken's simple objective of alleviating the tedium of his three employees thereby promoting their efficiency (App. 59A).

[23] A commentator has characterized the Jewell-LaSalle station as presenting "one of those rarities—a station not licensed by the copyright owners." Sprague, 3 AIR LAW REVIEW 417 (1932). It is doubtful that more than a few, if any, currently operating commercial radio stations broadcast copyrighted music without licenses from ASCAP and one or more of the other performing rights societies. But if such a rarity does exist, it need not concern us in this case for Station WKJF-FM was indisputably licensed by ASCAP to broadcast the two musical compositions.

on his radio set. Although petitioners seek (Br. 14-16) to deprecate this distinction, they cannot ignore the fact that the Court in *Jewell-LaSalle* expressly stated: "We have no occasion to determine . . . the effect upon others of [the broadcaster] paying a license fee," [24] and pointed out that:

> "If the copyrighted composition had been broadcast by Duncan [the operator of the station] with plaintiffs' consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare Buck v. Debaum (D. C.) 40 F. (2d) 734." [25]

In the *Debaum* case to which reference was made, the importance of the copyright owners' authorization of the station's broadcasts was emphasized. The court stated that they thereby must be held to have acquiesced in the use of the broadcasts by the cafe owner. For, as the court observed:

> "It is common knowledge, of which the court should take judicial notice, that programs from commercial radio broadcasting stations are interspersed with lectures, instrumental and vocal musical compositions, sermons, speeches, etc., many of which are not protected by the copyright laws of the United States, and many of which can be unconditionally and freely performed by the broadcasting station, and, if during the reception of such programs, one using the radio in his business is required to turn the dial of his receiving set so as to render inaudible any copyrighted composition, the utmost difficulty and confusion will result, and a condition ensue that to my mind is unreasonable, and one that was never within the intent of Congress in passing the Copyright Act

[24] 283 U.S. at 198.

[25] *Id.* at 199, n. 5.

or within the reasonable purview of the terms thereof." [26]

ASCAP, on behalf of the copyright owners, negotiated a royalty arrangement with Station WKJF-FM, Pittsburgh, under which broadcasts of music from the ASCAP repertory, including the two compositions involved here, could be released by the station for reception by the public and, thus, exhausted the monopoly in the copyrights so far as simultaneous reception of the broadcasts was concerned. Consequently, the public—whether in their homes, in Aiken's store, in their doctors' offices, or anywhere else within reach of the station—had a license implied in law to receive that broadcast.

III. The Imposition of Copyright Liability on Aiken Would Defeat the Objectives of Both the Copyright Act and the Communications Act.

Petitioners concede (Br. 8-9) that Aiken would not have been required to obtain an ASCAP license if he had continued to use a home-type radio receiver with no external speakers. The attempted distinction among commercial establishments on the basis of whether or not external speakers are used is arbitrary.[27]

The free use of receiving sets should not be dependent upon the grace or forbearance of performing rights organizations or other copyright owners. The Copy-

[26] 40 F.2d at 736.

[27] Presumably ASCAP would not insist upon exacting a license from Aiken for radio broadcasts in his home even if his receiving "set" was not assembled in one piece but, for better reception for himself and his guests, included several separate speakers.

right Office, in a report which was the culmination of extensive studies of the copyright laws, has pointed out that:

> "Although the *Jewell-LaSalle* case involved a retransmission, the effect of this decision may be that any business establishment that operates a radio or television receiving set for the entertainment of its patrons—including hotels, restaurants, taverns, barber shops, etc.—could be required to procure performing licenses for all copyrighted works in the broadcasts it receives.
>
> "As a practical matter this problem has been confined so far to broadcasts of music, though it could conceivably arise also as to broadcasts of dramatic and literary works and even of motion pictures. We understand that the two principal organizations controlling the performing rights in music (ASCAP and BMI) have generally followed the policy of confining their demands for license fees to those establishments, such as the hotel in the *Jewell-LaSalle* case, that retransmit broadcasts to their various rooms. Other similar organizations, however, may not have the same policy. And there have been complaints from some small establishments that they were asked to obtain performing licenses for the mere operation of receiving sets. In any event, the free use of receiving sets should not be left to the grace or forbearance of the performing rights organizations or other copyright owners.
>
> * * *
>
> "We believe [the] principle of clearance at the source should apply to the reception of broadcasts. The performing license obtained by the broadcaster should suffice, with no further license required of those who merely receive the broadcast. We would, however, require the receiver to obtain a performing license if he makes a charge to the

public for the reception of the broadcast—for example, by charging an admission fee, or by requiring a payment for operation of the receiving set."[28]

The primary policy of the Copyright Act is to make available to the public the benefit of an author's or composer's work; while reward to the copyright owner is also an important consideration, it is secondary and must be justified by its contribution to the primary objective.[29] Having released for broadcast the musical compositions for which Station WKJF-FM undertook to pay royalties, the copyright owners must be held to have intended that all members of the public could enjoy the rendition of the compositions as they came over the air without paying a second royalty. The royalties charged the broadcasting station were geared to its revenues and since commercial radio is an advertiser-supported medium, the revenues are affected by the number of listeners reached by the station, wherever they may be. The usual formula, expressed in terms of "cost per thousand", ultimately determines the station's revenues from advertisers. Having shared indirectly, as consumers of advertised products and services, in the burden of the royalty fees paid by the station to ASCAP,[30] Aiken's customers should not be required to make additional payments for the broadcasts. This would be the case if Aiken, forced to pay license fees, passed on this additional charge to his customers in the form of higher prices.

[28] REGISTER OF COPYRIGHTS, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 30-31, 87th Cong., 1st Sess. (House Judiciary Comm. Print, 1961).

[29] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[30] While the point may be argued by economists, conventional wisdom would seem to suggest that to some extent at least, these advertising costs are passed on to purchasers of the advertised products and services.

Furthermore, if Aiken should be held to be engaging in a "performance for profit", acceding to ASCAP's demands would, at best, afford him only partial protection against infringement claims. Having no control over, or advance notice of, what any station might broadcast, he obviously might tune in a station at a time when it was performing a copyrighted work not in the ASCAP repertory.[31] Short of obtaining licenses from representatives of every copyright owner whose works might be on the air at any time and over every station which could be heard over his set, his best protection would be in keeping the set turned off. Thus, the consequence of upholding ASCAP's position may well be that lunch counters, barber shops, dentist's offices, hospitals and a myriad of other establishments throughout the country would choose to keep their sets turned off, thereby depriving a large part of the public of access to radio broadcasts unless they carry their own portable radios.

[31] In the *Fortnightly* case, BMI stated that it "is a music performing rights licensing organization which licenses the right publicly to perform for profit the music of more than 14,000 writers and more than 8,000 publishers of music. . . . The royalties collected by BMI, after deduction of expenses and reasonable reserves, are distributed to its affiliated writers and publishers. By far the largest part of those royalties are paid by broadcasters who have licenses to broadcast over their facilities any or all of the works in the BMI repertory at a royalty based on the station's gross receipts from advertising." Brief of Broadcast Music, Inc. as Amicus Curiae at 1 (footnotes omitted).

Copyright owners, having the means of obtaining adequate royalties by licensing broadcast stations—*i.e.*, clearance at the source, in which the royalties reflect the size of the listening audience and consequent revenues of the stations from advertisers—should not be awarded double payments. Their present effort to exact additional license fees is inconsistent with congressional objectives as expressed in the Communications Act, the "avowed aim" of which, as this Court has pointed out, is "to secure the maximum benefit of radio to all the people of the United States." [32]

Petitioners claim that the provision which ASCAP devised after *Debaum* and *Jewell-LaSalle* for inclusion in licenses to broadcast stations has negated any implied right of commercial establishments to receive broadcast music (Br. 15-16). A parallel argument was rejected in *Fortnightly* and *Teleprompter* where the same license provision was involved.[33] The short answer to petitioners' contention is that ASCAP simply cannot expect to obtain royalties by authorizing stations to broadcast music from its repertory—broadcasting being defined as "the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations" [34]—and then expect to receive additional remuneration from members of the public who are entitled to hear the broadcasts.

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[32] National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943).

[33] The only difference—clearly immaterial—is that the licenses in the CATV cases, since they were entered into with television stations, refer to "television" broadcasts whereas here "radio" broadcasts are involved.

[34] The Communications Act of 1934, 47 U.S.C. § 153(o) (1970).

IV. Congress Has Not Manifested Such Support of Jewell-LaSalle As Would Warrant Its Extension to the Facts in This Case.

Petitioners maintain (Br. 34) that "*Jewell-LaSalle* has become an integral part of our copyright law, with the full concurrence of the Congress." They rely on congressional failure to enact proposed legislation which would reject or modify *Jewell-LaSalle* and, seemingly, they also rely on congressional failure to enact proposed legislation which "sought to codify *Jewell-LaSalle,* rather than circumscribe it" (Br. 31). This legislative history of unenacted legislation is unconvincing to establish congressional intent.

Neither party's position is advanced by legislative history. For, as this Court has observed: "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." [35] We have been admonished that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." [36] The congressional silence in which petitioners ostensibly find comfort is at best a flimsy basis upon which to decide the case at bar.[37]

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[35] Girouard v. United States, 328 U.S. 61, 69 (1946).

[36] Helvering v. Hallock, 309 U.S. 106, 121 (1940); *accord* Boy's Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970); United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944).

[37] The three cases relied upon by petitioners (Br. 29) are readily distinguishable. In Canada Packers, Ltd. v. Atchison, T. & S. F. Ry., 385 U.S. 182 (1966), the Court, in refusing to upset a prior ruling which sanctioned ICC jurisdiction in proceedings to determine reasonableness of international freight rates, was influenced by deference to longstanding administrative policies of an independent regulatory agency and numerous prior judicial decisions reaffirming the challenged construction. The failure of Congress to express a contrary interpretation of the statute was just one of many consid-

Petitioners lay stress on the language contained in S. 1361, adopted by the Senate on September 9, 1974, that "communication embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes [is *not* an infringement of the copyrights of broadcast music], unless: (A) a direct charge is made to see or hear the transmission; or (B) the transmission thus received is further transmitted to the public" (Br. 32). From this language, as well as an essentially identical formulation contained in a bill which passed the House of Representatives in 1967,[38] petitioners make a broad leap to an unwarranted conclusion that Congress has thereby manifested a judgment that reception of broadcasts in public places *is* a performance "both analytically and from the view of legislative policy" (Br. 33). Even if this questionable assertion were valid and, further, assuming enactment of the legislation, Aiken would not be an infringer on the facts of this case. No direct charge was imposed upon customers for listening to the radio in his store; and the broadcasts can hardly be said to have been "further transmitted to the public" by Aiken when all he did was to install two speakers in a relatively small room where food was purchased and consumed.

erations. In Joint Industry Board v. United States, 391 U.S. 224 (1968), Congress had completely reenacted the pertinent section of the Bankruptcy Act, leaving unchanged the construction of that provision by this Court in an earlier case. In Walling v. Halliburton Co., 331 U.S. 17 (1947), even though the Court noted the unwillingness or inability of Congress to modify the relevant statutory section which had been construed in an earlier case, it relied on *stare decisis* primarily because a number of its own decisions subsequent to the challenged ruling had approved of the decision in question, and it had been followed in numerous lower court cases.

[38] H.R. 2512, 90th Cong., 1st Sess. (1967).

To the extent, if any, that the congressional action-inaction theory relied upon by petitioners has any significance whatever, it suggests perhaps that Congress may be tending to favor the position recommended by the Copyright Office, *supra,* page 21.[39] But, whatever may be the nature and effect of any future legislation which may be adopted by Congress to revise the Copyright Act, Aiken cannot be deemed an infringer under the statute now in effect.

V. There Has Been No Such Reliance Upon Jewell-LaSalle as to Warrant Its Extension to an Aiken-Type Operation.

A. THE BUSINESS RELATIONSHIPS WHICH ARE CLAIMED TO BE DEPENDENT ON JEWELL-LaSALLE DO NOT COMPEL ADHERENCE TO THAT QUESTIONABLE DECISION.

Petitioners argue that a failure by this Court to adhere to *Jewell-LaSalle* will result in the disruption of significant business relationships, jeopardize the income of creative composers and inflict grievous injury upon an important cultural institution (Br. 27-28, 34-35). Granted that some licensing arrangements have been entered into by copyright owners by invoking the authority of *Jewell-LaSalle*, it does not necessarily follow that unless that decision is held dispositive in the instant case, consequences of the kind suggested by petitioners' rhetoric will ensue.

The District Court found that ASCAP has contractual relationships with 5,156 business firms resulting

[39] See Sen. Judiciary Comm., Copyright Law Revision, S. Rep. No. 983, 93rd Cong., 2d Sess. 130 (1974).

in royalty payments of $246,000 annually.[40] These revenues represent 0.3% of ASCAP's total royalties of $70,000,000 annually (App. 49A). The record is barren of any evidence upon which to base an inference that any of the 5,150 licenses will be cancelled if Aiken is held not to have engaged in an infringing performance. To the contrary, since all 5,150 licensees are authorized by ASCAP to use not only radio broadcasts of ASCAP compositions but also tapes and recorded music (App. 43A), a large number might well continue their ASCAP relationship notwithstanding that licenses are not required merely to receive radio broadcasts. In any event, even on the unlikely assumption that all 5,150 licensees would discontinue their payments of license fees to ASCAP if the decision below were upheld, that can hardly be considered a reliance interest of sufficient magnitude or importance to warrant continued adherence to *Jewell-LaSalle* in disregard of the fallacious premise on which it was based.

Petitioners also intimate that an affirmance of the decision below will in some way affect the fees of $2,100,000 which are now collected by ASCAP from Muzak affiliates and other licensees which supply "background" music to subscribers (Br. 2, 10 and 27). Regardless of the viability *vel non* of *Jewell-LaSalle*, each of the Muzak affiliates, being a *supplier* of background music, will continue to be engaged in a "performance for profit" and thus will continue to obtain licenses from, and pay royalties to, ASCAP and other performing rights organizations.[41] The District Court stated

[40] 356 F. Supp. at 273.

[41] ASCAP's General Counsel testified that when commercial establishments using radio "operate the beep [to delete commercials] ASCAP [requires] licenses [from] the supplier of the music, that is like Muzak" (App. 43A).

that a decision adverse to petitioners "might have an effect on a pending request for reduction of licensing fees which has been filed by Muzak affiliates in the Southern District of New York," [42] but petitioners have failed either to concede any such effect or to demonstrate what diminution, if any, there will be in the license fees which they now realize from Muzak affiliates.

In sum, petitioners have failed to show such a substantial reliance interest upon *Jewell-LaSalle* that this Court should be estopped from limiting that decision to its own factual setting. It is common knowledge that in a vast number of business establishments, commercial vehicles and professional offices, radio sets, with or without additional speakers, are turned on daily to receive radio broadcasts.[43] If Aiken and others similarly situated are able to play their radios in their stores without fear of copyright penalties, the size of radio audiences during business hours will be maintained. In turn, the advertising revenues of the broadcasting stations will be preserved.[44] And since ASCAP

[42] 356 F. Supp. at 273 (1973). This statement of the District Court was adopted in the amicus brief filed by Muzak Corporation in the Court of Appeals, 500 F. 2d 127, 129. The ASCAP consent decree (*supra*, p. 4, n. 3) which governs relationships with licensees limits the license period to a maximum of five years; various legal, economic and technological developments may be reflected in new license agreements to assure that they are reasonable and non-discriminatory.

[43] It may be noted parenthetically that there are 7,807 radio stations operating in this country—4,434 AM; 2,648 FM; and 725 FM educational—as of January 31, 1975. FCC Press Release No. 46399 (February 12, 1975).

[44] Ratings of stations, which are widely relied upon by advertising agencies in placing radio advertising for their clients, reflect

royalties from broadcasting stations are based upon the stations' advertising revenues, it may well be that the loss of any part of the $246,000 which it presently receives directly from commercial establishments will be offset by additional royalties from the stations.

In *Teleprompter,* the Court, when faced with an argument similar to that pressed here by petitioners, stated:

> "By extending the range of viewability of a broadcast program, CATV systems thus do not interfere in any traditional sense with the copyright holders' means of extracting recompense for their creativity or labor. When a broadcaster transmits a program under license from the copyright holder . . . he gets paid by advertisers on the basis of all viewers who watch the program. The use of CATV does not significantly alter this situation. . . . From the point of view of the copyright holders, such market changes will mean that the compensation a broadcaster will be willing to pay for the use of copyrighted material will be calculated on the basis of the size of the direct broadcast market augmented by the size of the CATV market." [45]

B. FLOOD v. KUHN DOES NOT REQUIRE ADHERENCE TO THE ERRONEOUS STANDARD OF JEWELL-LaSALLE.

Flood v. *Kuhn,* 407 U.S. 258 (1972), is urged by petitioners as a precedent for *stare decisis* in the instant case. That decision is, however, readily distinguishable.

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the results of surveys of the listening habits of a representative sample of people within the reach of the station. In the influential ARB surveys, listeners are instructed to carry the Arbitron diary with them wherever they may be during the period of the survey and to indicate therein the name of the station to which they are listening *wherever* they happen to be. ARB (American Research Bureau), Inc., Beltsville, Md., An Arbitron Radio Diary (1974).

[45] 415 U.S. at 412-13.

In *Flood* v. *Kuhn,* the Court held that the exemption of professional baseball from the antitrust laws as a result of its decision in *Federal Baseball Club* v. *National League,* 259 U.S. 200(1922), has become such an established "aberration" (to use the Court's term) that:

> "We continue to be loath, 50 years after *Federal Baseball* and almost two decades after *Toolson,* to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, *has clearly evinced* a desire not to disapprove them legislatively." [46]

Thus, as applied in *Flood* v. *Kuhn, stare decisis* was predicated on a unique and longstanding statutory interpretation which had been applied by this Court on two previous occasions; there was a reliance upon those decisions by a significant segment of the public; and there was a clearly evinced desire by Congress *not* to disapprove of those decisions legislatively. Contrastingly, the rationale of *Jewell-LaSalle* was squarely rejected by this Court; such reliance interests as are involved are relatively insubstantial; and there is no clearly evinced desire by Congress to disapprove of the manner in which this Court has treated *Jewell-La Salle* in the *Fortnightly* and *Teleprompter* cases.

No legal or equitable considerations have been advanced by petitioners which would necessitate a departure by this Court from its current sound statutory construction of the term "performance" in the Copyright Act. Retrogression to the *Jewell-LaSalle* doctrine would serve no useful purpose. The Court of Appeals,

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[46] 407 U.S. 258, 283 (1972) (emphasis added).

we submit, acted correctly in applying *Fortnightly* and *Teleprompter* to the facts in the instant case and reached the proper result.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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